2-7-2014

State v. Halseth Respondent's Brief Dckt. 41169

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	NO. 41169
	)	
v.	)	KOOTENAI CO. NO. CR 2012-21618
	)	
DENNIS JOHN HALSETH,	)	RESPONDENT'S BRIEF
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

The State of Idaho appeals from the district court's order granting Mr. Halseth's motion to suppress. The order of the district court should be affirmed because *State v. Diaz,* 144 Idaho 300 (2007), has been abrogated by *Missouri v. McNeely* 569 U.S. ___, 133 S.Ct. 1552 (2013). Alternatively, if this Court believes that *Diaz* has not been abrogated by *McNeely*, Mr. Halseth asserts that *Diaz* should be overruled.

Statement of the Facts and Course of Proceedings

The following facts are taken from the district court's order granting Mr. Halseth's motion to suppress: On November 5, 2012, Officer Boni from the Post Falls Police Department was dispatched to locate a gray truck with stolen Washington license plates. (R., p.119.) Officer Boni was advised that the truck would have a snow blower in the back. (R., p.119.) Officer Boni located a vehicle matching this description and initiated a felony traffic stop in a parking lot. (R., p.119.)

After the officer told the driver to stay in the vehicle, the vehicle drove into oncoming traffic, striking another car, causing minor damage. (R., p.120.) Officer Boni pursued the vehicle; during this pursuit his vehicle was struck by another vehicle. (R., p.120.) Officer Boni then discontinued the pursuit. (R., p.120.)

Shortly thereafter, Officer Boni was advised that the Washington State Patrol had taken the driver of the vehicle, Mr. Halseth, into custody. (R., p.120.) Mr. Halseth refused to complete voluntary field sobriety tests. (R., p.120.)

Upon arriving at the scene, Officer Boni detected a strong odor of an alcoholic beverage on Mr. Halseth and Mr. Halseth was then transported to Sacred Heart Medical Center for evidentiary testing via blood draw. (R., p.121.) Mr. Halseth allegedly stated, "you can't take my blood! I refused! How can you take it without permission!" (R., p.121.) Despite this alleged refusal, the hospital tech took the blood draw without a warrant. (R., p.121.)

Mr. Halseth was charged with burglary, two counts of grand theft, eluding a police officer, operating a motor vehicle while under the influence of alcohol, and leaving the scene of an accident. (R., p.38.) The DUI was charged as felony due to two prior convictions for DUI. (R., p.40.) One of the grand theft charges was subsequently dismissed by the State. (R., p.61.)

Mr. Halseth filed a motion to suppress and supporting memorandum, asserting that the results of an involuntary blood draw be suppressed because the draw violated both the Fourth Amendment and Article I, Section 17 of the Idaho Constitution. (R., pp.72, 78.) The district court granted the motion to suppress. (R., p.119.)

The State appealed. (R., p.150.) Because the district court was correct that *Diaz* is incompatible with *McNeely*, the district court's order should be affirmed. However, Mr. *Halseth* also asserts that *Diaz* was wrong when it was decided and should be overruled even if compatible with *McNeely*.

ISSUE

Has the State failed to show error in the district court's order granting Mr. Halseth's motion to suppress?

ARGUMENT

I.

The State Has Failed To Show Error In The District Court's Order Granting Mr. Halseth's Motion To Suppress

A. Introduction

Mr. Halseth submits that the order of the district court should be affirmed because *State v. Diaz,* 144 Idaho 300 (2007), has been abrogated by *Missouri v. McNeely* 569 U.S. ___, 133 S.Ct. 1552 (2013). Alternatively, if this Court believes that *Diaz* has not been abrogated by *McNeely*, Mr. Halseth asserts that *Diaz* should be overruled.

B. Standard Of Review

In reviewing an order on a motion to suppress, this Court defers to the district court's factual findings unless clearly erroneous and exercises free review over the district court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *State v. Donato*, 135 Idaho 469, 470 (2001).

C. The State Has Failed To Show Error In The District Court's Order Granting Mr. Halseth's Motion To Suppress

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." A warrantless search of the person is reasonable only if it falls within a recognized exception. *See, e.g., United States v. Robinson,* 414 U.S. 218, 224 (1973). That principle applies to the type of search at issue in this case, which involved a

compelled physical intrusion beneath Mr. Halseth's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. "Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Missouri v. McNeely*, 569 U.S. __, 133 S. Ct. 1552, 1558 (2013) (citing *Winston v. Lee,* 470 U.S. 753, 760 (1985); *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 616 (1989).

When a warrantless search or seizure has occurred, the State bears a heavy burden to justify dispensing with the warrant requirement. *Welsh v. Wisconsin,* 466 U.S. 740, 749-750 (1984); *State v. Curl,* 125 Idaho 224, 225 (1993). If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search must be excluded as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

In 1966, the United States Supreme Court directly addressed a blood draw as a Fourth Amendment violation. *See Schmerber v. California,* 384 U.S. 757 (1966). In *Schmerber,* the petitioner and a companion had been drinking at a bar in a bowling alley. 384 U.S. at 758 n.2. After the pair left the bowling alley, the car which the petitioner was driving skidded, crossed the road, and struck a tree. *Id.* Both the petitioner and his companion were injured and taken to the hospital for treatment. *Id.* At the hospital, a police officer directed a physician to draw a blood sample from the petitioner. *Id.* at 758. The results revealed a percent by weight of alcohol in the petitioner's blood, which indicated intoxication, and such results were admitted at the petitioner's trial. *Id.* at 759. The petitioner objected to the admission of the results, arguing that his blood was drawn despite his refusal to consent to the test. *Id.*

The *Schmerber* Court found no Fourth Amendment violation stemming from the warrantless taking of the petitioner's blood under the unique facts of the case. Specifically, the Court relied on the destruction of blood evidence as a relevant factor in the exigency determination under the following circumstances: the officer investigating the accident encountered the defendant at the accident scene; the defendant smelled of alcohol; the passenger in defendant's car was injured and taken to the hospital; the investigating officer arrived at the hospital where defendant was being treated almost two hours after the accident; and finally, the defendant was placed under arrest. The *Schmerber* Court stated:

> ***We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.*** Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 771 (emphasis added).

However, the Court did not establish a *per se* rule:

> It bears repeating, however, that we reach this judgment ***only on the facts of the present record***. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more ***substantial intrusions, or intrusions under other conditions.***

Id. (emphasis added).

In 1989, this Court decided *State v. Woolery*, 116 Idaho 368 (1989). The *Woolery* Court first held that the metabolism of alcohol in the blood provided an inherent emergency which justified the warrantless search. *Id.* The Court then turned to the question of whether the test results should have been excluded because the officer did

not comply with I.C. § 18-8002. *Id.* at 371. After exploring cases from other jurisdictions, this Court concluded,

> The Idaho Legislature has not created a *statutory right* to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the *statutory right* to prevent the state from obtaining highly relevant evidence when a law enforcement officer has reasonable cause to believe the individual has committed a crime – whether it would be driving under the influence, vehicular manslaughter, sale or controlled substances, or murder. *If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood.*

Id. at 373 (emphasis added). Thus, this holding in *Woolery* is that, when the search is otherwise constitutional, I.C. § 18-8002 does not create a *statutory* right to revoke consent. This Court characterized the issue as follows: "the issue on appeal is whether the trial court erred in admitting appellant's blood alcohol content test results either because the officer requesting such test did not have reasonable grounds to administer the test or because appellant was not informed of his rights pursuant to I.C. § 18-8002." *Woolery*, 116 Idaho at 370.

In 2002, in an appeal from a driver's license suspension, this Court held that, "every driver who drives on Idaho roads has impliedly consented to submit to a BAC when properly requested by an officer." *Halen v. State*, 136 Idaho 829, 833 (2002). Halen involved only a license suspension as a result of the petitioner's refusal to take a BAC test; it was not a criminal case where the defendant sought suppression of the test. In fact, it appears that no search was done because, after Halen refused, he "was informed that his driver's license was being suspended based upon his refusal to submit

to a BAC." *Id.* at 831. Halen, "never submitted to a BAC test about which to conduct discovery." *Id.* at 835.

Building on *Halen*, in 2007, this Court decided *State v. Diaz*, 144 Idaho 300 (2007). In *Diaz,* the defendant was suspected of driving under the influence of alcohol and was transported by the arresting officer to a local hospital where his blood was drawn. *Id.* at 302. The defendant did not physically resist either being transported to the hospital or the taking of his blood, but orally protested the blood draw. *Id.* The Defendant was ultimately charged with felony DUI based on prior convictions, and he sought to suppress his blood test results, arguing that the test was involuntary and not justified by exigent circumstances. *Id.*

This Court rejected this argument, concluding that the blood draw could be justified either by exigent circumstances or consent. *Id.* The Court reasoned that because the defendant had "given his implied consent to evidentiary testing by driving on an Idaho road, he also gave his consent to a blood draw." *Id.* at 303. Given the Court's finding that the forcible blood draw was consensual, the Court went on to consider the reasonableness of the blood draw under the Fourth Amendment, in light of the totality of the circumstances including: (1) whether the procedure was done in a medically acceptable manner; and (2) whether the procedure was done without unreasonable force. *Id.* Finding the blood draw to be reasonable, the Court then considered whether I.C. § 18-8002(6)(b) permits officers to order involuntary blood draws absent offenses such as aggravated DUI or vehicular manslaughter. *Id.* The Court found that the statute provides no protection to drivers, but only to hospital professionals, and does nothing more than limit when an officer may request, rather

than order, hospital personnel to draw a driver's blood against the driver's will. *Id.* at 303-304.

Recently, however, the United States Supreme Court rejected the notion that a DUI investigation, by itself, justifies dispensing with the warrant requirement. *Missouri v. McNeely* 569 U.S. ___, 133 S.Ct. 1558 (2013). In *McNeely*, the respondent was validly stopped and after declining to take a breath test, was arrested and taken to a nearby hospital for a blood draw. *Id.* at 1557-1558. At the hospital, Mr. McNeely refused to consent to the blood draw, but the officer ordered the technician to take the blood anyway. *Id.* The officer never attempted to secure a search warrant. *Id.* Mr. McNeely's blood alcohol content ("BAC") measured at .154 percent. *Id.* McNeely's suppression motion was granted and the Missouri Supreme Court affirmed the lower court's order granting suppression of the BAC results, relying on *Schmerber*. *Id.* The United States Supreme Court granted certiorari to resolve a split in the circuits as to whether "the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that it suffices on its own to justify and exception to the warrant requirement. . . ." *Id.* at 1558.

The *McNeely* Court held that it did not: "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do that." *Id.* 133 S.Ct. at 1561. The Court first recognized the importance of the privacy interest at stake, holding that "absent an emergency, no less [than a warrant] could be required where intrusions in to the human body are concerned," and that the importance of a determination by a neutral and

detached magistrate before law enforcement is allowed to "invade another's body in search of evidence of guilt is indisputable and great." *Id.* at 1558. The Court reiterated what was seemingly forgotten by lower courts after *Schmerber*: to determine whether an officer faced an emergency which would justify alleviating the requirement of a warrant, the Court looks to the totality of the circumstances. *Id.* at 1559.

As part of the analysis, the Court observed that the dissipation of alcohol in the blood stream is different "in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation." *Id.* at 1561 (citing *Rhoaden v. Kentucky*, 413 U.S. 496 (1973)). While BAC evidence from an alleged drunk driver naturally dissipates over time, its dissipation is gradual and relatively predictable. *Id.* In addition, there is always a time gap at issue in each case where the officer has to transport the suspect to the place where the blood is to be drawn and is required to read all of the administrative license suspension warnings to each suspect. *Id.* These delays, in conjunction with advances in technology making it much easier to obtain a warrant, make the use of a *per se* rule unreasonable and violative of the Fourth Amendment. *Id.* at 1561-1562. The Court concluded, "[w]e hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 1568. *McNeely* abrogates *Woolery*'s holding that dissipation of alcohol is a per se exigency. *Id.* at 1558, n.2

1. Implied Consent Is Not A Valid Exception To The Warrant Requirement In This Case

In this case, the State does not assert that exigent circumstances justified the search. Instead, the State asserted that the search as justified by implied consent. Specifically, as noted by the district court, the State's argument was, once "an individual has received the benefit of the bargain of implied consent [by driving on public roadway], the driver may not void consent already given.'" (R., p.124 (citing the State's Brief in Opposition To Defendant's Motion to Suppress.)[1] The district court correctly disagreed. As the district court noted, the State asserted that, "because the U.S. Supreme Court did not address implied consent statutes in *McNeely*, *Diaz* and *Wheeler* can exist in harmony with the *McNeely* decision." (R., p.125.) The district court correctly concluded that this logic, "is contradictory to a reasonable interpretation of the implied consent statute, and to the recent U.S. Supreme Court *McNeely* decision." (R., p.125.)[2] The court agreed that *McNeely* did not explicitly address implied consent statutes, but concluded,

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[1] The State notes that the "district court did not make any factual findings on Halseth's allegation that he refused the test." (Appellant's Brief, p.1 n.1.) The district court found that Mr. Halseth "allegedly" refused, and that "despite" this alleged refusal, his blood was drawn. (R., p.121.) The only evidence submitted in the motion to suppress was State's Exhibit 3, which is the report of investigation prepared by the Washington State Trooper. (*See* State's Exhibit 3.) In the report, according to the officer, Mr. Halseth stated, "you can't take my blood! I refused! How can you just take it without premission [sic]?!" (State's Exhibit 3.) The State's own evidence demonstrates that Mr. Halseth refused the test; there is no evidence in the record that supports the conclusion that he did not.

[2] With regard to this statement by the district court, the State asserts that "the district court lacked authority to overrule the interpretation of the implied consent statute by Idaho appellate courts and was not at liberty to ignore that binding precedent." (Appellant's Brief, p.5 n.2.) While the State is correct that the district court cannot overrule a higher court, the district court also noted that this interpretation was inconsistent with *McNeely*, and the State has cited to no authority which holds that a

> It would antithetical to interpret the *McNeely* opinion was permitting warrantless blood draws simply because a state has legislation that allows such action. Under the State's logic, states could circumvent the *McNeely* decision by simply relying on implied consent statutes. In other words, the State's position is that states can bypass the U.S. Supreme Court's announcement that, absent exigent circumstances, the Fourth Amendment mandates that an officer obtain a warrant prior to conducting a blood draw by simply arguing implied consent.

(R., p.125.) There is no error in the district court's conclusion because a *per se* implied consent exception to warrant requirement does not comport with *McNeely*.

In *McNeely*, while addressing an exigent circumstances issue, the Court held that the use of a *per se* rule was unreasonable and violative of the Fourth Amendment. *McNeely,* 133 S.Ct. at 1561-1562. In this case, the State seeks to replace a *per se* exigency exception with a *per se* implied consent exception. This also violates the Fourth Amendment. The *McNeely* Court specifically stated, "[h]ere and in its own courts the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect." *Id.* at 1568. Yet, this is exactly the argument the State makes in this case as the State's assertion in the district court was that implied consent, by itself, justified the warrantless search. (Tr., p.37, Ls.9-13.) The State went so far as to agree that the implied consent law "trump[ed]" any constitutional challenges to a forced blood draw without exigent circumstances. (Tr., p.37, Ls.9-13.)

The *McNeely* court used a totality of the circumstances analysis because a "case-by case assessment of exigency" was the traditional test. *Id.* at 1561. The

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district court cannot conclude that a decision from the United States Supreme Court abrogates a decision of this Court or the Idaho Court of Appeals.

traditional test for consent is also a totality of the circumstances test. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Christofferson*, 101 Idaho 156 (1980). Thus, the proper test for determining consent is the totality of the circumstances. The State has the burden of proving that consent was "freely and voluntarily" given. *Schneckloth*, 412 U.S. at 222 (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. And, "knowledge of the right to refuse consent is one factor to be taken into account." *Id.* A blanket holding that implied consent always justifies a warrantless search where there is reasonable grounds to believe the defendant has been driving under the influence of alcohol relieves the state of this burden, because proving that consent has been "implied" does not establish that it was "freely and voluntarily" given. And the Supreme Court has clearly stated that consent can be refused, which is not taken into consideration with a *per se* implied consent rule. *Id.* Idaho's implied consent statute cannot reduce or rescind the basic and fundamental protections against unreasonable searches and seizures granted to all citizens by the Fourth Amendment to the United States Constitution. *See, e.g., Ybarra v. Illinois,* 444 U.S. 85, 96 n.11 (1979) (state statute which purports to authorize police in some circumstances to make searches and seizures without probable cause and without search warrants falls within the category of statutes "purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.")

The State asserts that the United States Supreme Court has apparently endorsed implied consent laws because the *McNeely* court mentioned that States can use them to enforce DUI laws. (Appellant's Brief, p.5.) The State is mistaken. First, this section of *McNeely* did not carry a majority of the court. Second, the Court did not even remotely suggest that implied consent could constitute a *per se* exception to the warrant requirement. The Court stated,

> As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. See NHTSA Review 173; *supra,* at 1556 (describing Missouri's implied consent law). **Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.** See NHTSA Review 173–175; see also *South Dakota v. Neville,* 459 U.S. 553, 554, 563–564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

McNeely, 133 S. Ct. at 1566 (emphasis added). Thus, this section of the opinion seems to take the position that States may use the penalties for withdrawing implied consent to enforce their DUI laws, not that implied consent is a *per se* exception to the warrant requirement.

Further, a recent grant of certiorari suggests that the Supreme Court believes that *McNeely* is relevant to the implied consent issue. In *Aviles v. State*, 385 S.W. 3d 110 (Ct. App. Tex. 2012), the Court of Appeals of Texas held that, despite the fact that the defendant refused testing, because the warrantless blood draw was conducted in

accordance with Texas's implied consent law, there was no Fourth Amendment violation. *Id.* at 115.

The defendant filed a petition for a writ of certiorari, which was granted. *Aviles v. Texas*, 2014 WL 102362 (Jan. 13, 2014). The Supreme Court order states the following: "the motion for petition for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Texas, Fourth District, for further consideration in light of *Missouri v. McNeely*, 569 U.S. ___ (2013.)" Thus, far from apparently endorsing implied consent laws, the Court is now granting writs of certiorari and vacating judgments that rely solely on implied consent.

Notably, the Supreme Court of Arizona recent issued an opinion in agreement with Mr. Halseth's argument. *See State v. Butler*, 302 P.3d 609 (2013). In *Butler*, the defendant, a juvenile, admitted to officers that he had driven to school after smoking marijuana. *Id.* at 611. After being given his warnings pursuant to Arizona's implied consent statute, the defendant "agreed verbally and in writing to have his blood drawn." *Id.* The *Butler* Court held that, "independent of [Arizona's implied consent statute], the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw. If the arrestee is a juvenile, the youth's age and a parent's presence are relevant, though not necessarily determinative, factors that courts should consider in assessing whether consent was voluntary under the circumstances." *Id.* at 613.

The court then conducted a totality of the circumstances analysis, stating,

> Although Tyler did not testify at the suppression hearing, sufficient evidence supports the juvenile court's finding that he did not voluntarily

> consent to the blood draw. At the time, Tyler was nearly seventeen and in eleventh grade. He had been arrested once previously, but not adjudicated delinquent. Tyler was detained for about two hours in a school room in the presence of school officials and a deputy. Neither of his parents was present. Tyler initially was shaking and visibly nervous. When he became loud and upset after being told he was being arrested, the deputy placed him in handcuffs until he calmed down. A second deputy sheriff arrived before the blood draw was taken. After removing the handcuffs, the first deputy read the implied consent admonition to Tyler, once verbatim and once in what the deputy termed "plain English," concluding with the statement, "You are, therefore, required to submit to the specified tests." Tyler then assented to the blood draw.

Id. at 613-14. The court thus concluded that, despite the implied consent statute and the fact that the defendant assented to the draw, there was no abuse of discretion by the juvenile court in its determination that the defendant's consent was involuntary. Id.

In sum, because *McNeely* rejects *per se* rules in favor of a totality of the circumstances test, the district court was correct in its conclusion that the blood draw in this case violated the Fourth Amendment and Article I, § 17 of the Idaho Constitution. The State has not shown, either in the district court or on appeal, that under the totality of the circumstances Mr. Halseth freely and voluntarily consented to the blood draw. In fact, the record shows the opposite. The decision of the district court should be affirmed on this basis.

2. <u>*Diaz* And Any Other Case that Holds that Implied Consent By Itself Justifies A Blood Draw Should Be Overruled</u>

Mr. Halseth asserts that, even if this Court concludes that *McNeely* does not abrogate *Diaz*, *Diaz* and any other case that holds that Idaho motorists have impliedly consented to involuntary blood draws if law enforcement has reasonable suspicion that the motorist is under the influence of an intoxicating substance should be overruled. It is well recognized that the doctrine of *stare decisis* need not be strictly adhered to if the

precedent in question is manifestly wrong, has proven over time to be unjust or unwise, or if overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652, 655 (2000) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). Mr. Halseth asserts that *Diaz* was manifestly wrong and should be overruled.

According to *Diaz*, by obtaining a driver's license, Idaho motorists have impliedly consented to involuntary blood draws if law enforcement has reasonable suspicion that the motorist is under the influence of an intoxicating substance. To the extent *Diaz* holds that Idaho's implied consent statute creates a *per se* rule that suffices on its own as an exception to the warrant requirement, it cannot comport with the Fourth Amendment.

As is set forth above, the Fourth Amendment requires consent to be demonstrated by the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Christofferson*, 101 Idaho 156 (1980). The State has the burden of proving that consent was "freely and voluntarily" given. *Schneckloth*, 412 U.S. at 222 (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. And, "knowledge of the right to refuse consent is one factor to be taken into account." *Id.* Idaho's implied consent statute cannot reduce or rescind the basic and fundamental protections against unreasonable searches and seizures granted to all citizens by the Fourth Amendment to the United States Constitution. *See, e.g., Ybarra v. Illinois,* 444 U.S. 85, 96 n.11 (1979)

(state statute which purports to authorize police in some circumstances to make searches and seizures without probable cause and without search warrants falls within the category of statutes "purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.")

Further, consent can be withdrawn at any time. *See Scheckloth,* 412 U.S.*at* 227, *Florida v. Jimeno*, 500 U.S. 348 (1991) (holding that a suspect may "delimit as he chooses the scope of the search to which he consents," in the context of a vehicle search); *United States v. McWeeney*, 454 F.3d 1030 (9th Cir. 2006) (holding that, "a suspect is free ... after initially giving consent, to delimit or withdraw his or her consent *at any time*," in the context of a stop and frisk); *United States v. Sanders*, 424 F.3d 768 (8th Cir. 2005) ("Once given, consent to search may be withdrawn."); *United States v. Lockett*, 406 F.3d 907 (3rd Cir. 2005) (recognizing that a suspect retains the right to revoke his consent in the context of a luggage search); *United States v. Marshall*, 348 F.3d 281 (1st Cir. 2003) (same, in the context of a home search); *United States v. Bustillos-Munoz*, 235 F.3d 505 (10th Cir. 2000) (same, in the context of a vehicle search); *United States v. McFarley*, 991 F.2d 1188 (4th Cir. 1993) (same, in the context of a luggage search). Mr. Halseth submits that irrevocable implied consent cannot exist in Fourth Amendment jurisprudence.

By holding that I.C. § 18-8002 provides for consent, by itself, this Court has abandoned the totality of the circumstances test required by *Schneckloth*. And, based upon the fact that this Court noted that the defendant in Diaz refused the testing, this Court appears to hold that implied consent cannot be withdrawn. These conclusions

are manifestly wrong in light of clear United States Supreme Court precedent regarding the State's burden to prove consent. Thus, *Diaz* must be overruled.

CONCLUSION

Mr. Halseth requests that this Court affirm the district court's order granting Mr. Halseth's motion to suppress.

DATED this 7th day of February, 2014.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of February, 2014, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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KOOTENAI COUNTY JAIL
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BENJAMIN R SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

J BRADFORD CHAPMAN
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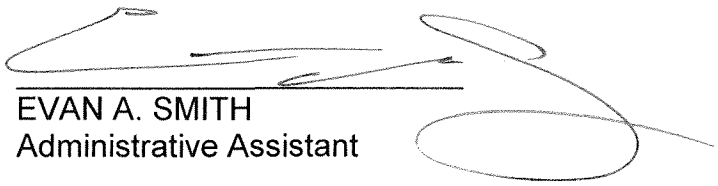

EVAN A. SMITH
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JMC/eas